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Approved For Release 2003/08/08 : CIA-RDP86-00101R000100020012-9

ROUTING AND RECORD SHEET

SUBJECT: (Optional) Intelligence Charters--Draft Issues Paper for Special Coordination Committee Consideration Regarding Collection of Information That Concerns United States Persons Who Are Potential Sources

FROM:
Assistant for Information, DDA
7D-02, Hqs.

EXTENSION

NO.

DDA 79-0697/2

DATE

20 MAR 1979

TO: (Officer designation, room number, and building)

DATE

RECEIVED

FORWARDED

OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

1. Director of Security
4E-60, Hqs. (FX-1)

2.

3.

4.

5.

6.

7.

8.

Please review the attached issues paper on collection of information about U.S. persons. Please provide me with any comments or concerns you might have as I am pulling together a directorate response.

Att: a/s

AAI/DDA: ydc (19 Mar 79)

Distribution:

Orig PRS - Addressee w/att

✓ - AI Subject w/att (S.2525-General)

1 - AI Chrono

OGC Has Reviewed

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OGC 79-02572
16 March 1979

DD/A Registry

79-0697/2

MEMORANDUM FOR: Director of Central Intelligence
Deputy Director of Central Intelligence
Deputy Director for Operations
Deputy Director for Science & Technology
Deputy Director for Administration
Legislative Counsel
Director, National Foreign Assessment Center
Deputy to the DCI for Collection Tasking

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Intelligence Charters--Draft Issues Paper
for Special Coordination Committee Con-
sideration Regarding Collection of
Information That Concerns United States
Persons Who Are Potential Sources

1. Action Requested: It is recommended that you review the attached memorandum in anticipation of further SCC action.

2. Background: As I informed you in my memorandum of 6 March transmitting the draft SCC issue paper concerning special activities, we assumed the burden of drafting an SCC issue paper on the topic of collection concerning U.S. persons who are potential sources of assistance. Attached, for your information and review pending further action, is a copy of that issue paper and my cover memorandum to David Aaron. Drafts of this paper were coordinated within the Agency with appropriate components of the DDO and the Office of Security.

3. Recommendation: It is recommended you review the attached draft issue paper concerning potential source collection.

[Redacted Signature Box]

Anthony A. Lapham

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Attachments

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Washington, D.C. 20505

14 March 1979

MEMORANDUM FOR : David Aaron
Assistant to the President for
National Security Affairs

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Intelligence Charters - Draft Issue Paper.
Regarding Collection of Information Concerning
United States Persons Who Have Been Identified
As Potential Sources Of Information Or
Operational Assistance

Your memorandum of 16 February, among other things, assigned responsibility to the Department of Justice for preparing an issue paper for SCC consideration concerning "Recruitment of U.S. persons, including source investigations" By my memorandum to you of 2 March, I suggested that this Agency prepare that paper and my suggestion was accepted subsequently.

In fulfillment of that responsibility, I enclose a draft issue paper for the SCC describing current practice relating to collection of information regarding United States persons who are potential sources of assistance and the issues, as we see them, that have been raised in this regard during the charter legislation process. While this paper has been coordinated informally with the FBI, it is recommended that the views of the various agencies involved in the charter process be solicited as to whether it fairly represents the issues prior to its discussion at an SCC meeting.



Anthony A. Lapham

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Enclosure

COLLECTION OF INFORMATION CONCERNING POTENTIAL SOURCES
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INTELLIGENCE CHARTER ISSUE PAPER

FOR THE SPECIAL COORDINATION COMMITTEE

I. Background: It is the purpose of this paper to present for SCC consideration and resolution issues relating to the collection of information concerning United States persons without their consent when such persons are determined by United States intelligence entities to be potential sources of information or operational assistance. Since there appears to be no serious objection to collection of information, even utilizing false credentials to conceal the intelligence interest because of the nature of the activity for which assistance is sought, concerning United States persons who have agreed to provide assistance and have consented to such collection or who are being considered for employment or as contractors with an intelligence entity, these types of activity are not discussed further below.

The issues presented relate to whether:

- a. Collection of information concerning United States persons who are identified as potential sources of information or assistance may be conducted without their consent;
- b. The length of time during which such collection without consent is conducted should be limited by statute, and
- c. The means by which such collection without consent is conducted should be limited by statute.

II. Current Practice: United States persons who may be in a position to provide information or assistance to an intelligence entity may come to its attention in a variety of ways including chance encounters, recommendations from existing sources, official inquiries and positive efforts to seek out persons with particular types of contact or capabilities.

Executive Order 12036 provides that information that is not available publicly may be collected without the consent of the United States person concerned when that person is reasonably believed to be a potential source or contact, but only for the purpose of determining suitability or credibility. Such collection activities are required to be conducted subject to the order's restrictions on the use of various collection techniques and pursuant to procedures approved by the Attorney General. The required procedures, while under development, have not yet been finalized or implemented.

When a United States person who may be a useful source or contact is identified, preliminary inquiries may be made without the knowledge or consent of that person in order to determine whether to attempt to solicit the person's assistance. During this preliminary stage, a review of publicly available information may be conducted, requests may be made for reviews of the records of the intelligence entity and other entities, and inquiries may be made to establish or confirm identity or suitability. To make these potential sources aware of the intelligence interest and objective before assessing their veracity, reliability, loyalty, and receptiveness is to risk premature disclosure and frustration of the objective, undue exposure of the identities of the intelligence employees involved, or the subsequent failure of the activity itself due to difficulties with the source that could have been anticipated as a result of a preliminary inquiry.

When it appears that the United States person has the requisite contacts or capabilities, and may be a suitable prospect (a benchmark that may take varying lengths of time to reach depending upon the circumstances of each case) the person's assistance is solicited and the intelligence, or, in limited circumstances abroad, the United States Government, interest is revealed. If the person agrees to cooperate, consent is obtained for further inquiries.

III. Issue - Whether Consent Should Be Required: Under Executive Order 12036, nonpublic information may be collected concerning United States persons who are reasonably believed to be potential sources or contacts without their consent. The order does not require that such collection be approved at any particular level of authority within the collecting entity. However, such collection is limited under the order by the restrictions on the use of various techniques and by the requirement that collection be limited to that information necessary to determine suitability or credibility and be conducted pursuant to procedures approved by the Attorney General.

The Senate bill, S.2525, would have authorized collection of information concerning a United States person reasonably believed to be a potential source of information or operational assistance to the extent necessary to determine suitability or credibility. The consent of the subject would be required except where a designated official of the intelligence entity collecting the information has determined there to be a serious intention to utilize the United States person as a source and that requesting consent would

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jeopardize the activity for which the assistance of a United States person is to be sought. The SSCI has continued to maintain this position in its most recent (November 1978) statement of the intended content of charter legislation.

A general requirement, with narrow exceptions, to obtain the consent of any United States person believed to be a potential source or contact prior to collecting non-public information as to that person's suitability would be intended, obviously, to limit the numbers and circumstances of unconsented collection activities of this type. Rather than proceeding without consent in all cases, a careful determination would be required in each case as to whether to obtain the subject's consent and only a select number of such collection activities likely would be conducted without such consent.

In opposition it may be argued that such a requirement is needless since the collection would be self-limiting (i.e., information necessary to determine "suitability" or "credibility") and the most threatening collection techniques (i.e., electronic surveillance and monitoring, physical searches and mail surveillance) would not be available for this purpose. Further, a requirement that consent be obtained except where security concerns militate against requesting it, may be ineffectual and the exception might quickly become the rule since preliminary collection of one degree or another is necessary in virtually all cases as a prelude to determining whether the assistance and consent of the person should be requested.

The alternatives would appear to include (i) requiring consent prior to any collection of nonpublic information for these purposes in all cases, (ii) requiring such consent as a general rule coupled with authority for officials at appropriate levels of the entity to invoke exceptions in cases where there is some concern as to the subject's suitability or credibility, (iii) not requiring consent, leaving it to the limited scope of the authorizing language and the restricted means by which it may be accomplished to regulate unconsented collection, or (iv) not requiring consent in statute, leaving it to procedures approved by the Attorney General to limit the nature and extent of collection without consent.

IV. Issue - Limitations on the Time Allowed for Unconsented Collection: If it is determined that some degree of collection should be authorized without the consent of the United States person who is the potential source or contact, another issue is raised concerning whether there should be a specific time limit imposed on such collection activities.

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Executive Order 12036 includes no such time limit. The Senate bill would have limited all collection for such purposes, apparently whether consented or unconsented, to 90 days without exception and without provision for renewal or extension. The most recent SSCI position paper advocates "strict time limits."

A time limit on collection of this type would be intended, of course, to prevent extended gathering and accumulation of information concerning any unwitting United States person merely on the basis of an intention to utilize the person as a source or contact at some future date. Requiring that all such collection cease after 90 days would require that only a limited, specific inquiry be conducted and would discourage overbroad collection activities.

The difficulty with such a time limit, especially where no provision is allowed for extension or exception, is that it presumes a precise and focused dedication of resources and fails to recognize the realities or practicalities of this type of collection. Merely requesting, receiving and assimilating information in the records of selected federal agencies may frequently require over 30 days alone, especially when the United States person has had extensive foreign contacts. Such a time limit would effectively bar such collection if it were to include in the 90-day limit the collection that occurs after the consent of the subject is obtained since such background investigations often require a minimum of 180 days.

The alternatives would appear to include (i) imposing a specific time limit on unconsented collection, (ii) imposing such limits on unconsented collection of this type but allowing exceptions, (iii) imposing no time limit on such collection, leaving it to the limitations stemming from the finiteness of available resources, the lack of availability of the most intrusive techniques, and the language of the authorizing provision to narrow the type and amount of information that may be collected and thus the period of time during which collection will continue, or (iv) including no time limit in statute, leaving it to procedures approved by the Attorney General to regulate the duration of such collection.

V. Issue - Limitations on the Means By Which Unconsented Collection May be Accomplished: A determination that unconsented collection of nonpublic information to determine the suitability or credibility of United States persons as potential sources or contacts should be authorized also results in an issue concerning whether there should be statutory limits on the means by which such collection may be conducted.

public information and does not include specific limitations on techniques for collection of nonpublic information that concerns a United States person's suitability or credibility as a potential source or contact. However, the conditions imposed by that order on the use of electronic surveillance and monitoring, physical search and mail opening, and mail surveillance, effectively prohibit the utilization of any of those techniques (except that physical surveillance may be used by the FBI "in the course of a lawful investigation") to collect information concerning an unconsenting United States person because that person is considered to be a potential source or contact.

The Senate bill would have gone further and limited collection for this purpose to gathering of publicly available information, requests for existing information from the records of federal agencies, and "interviews" (not defined but apparently understood to mean individual inquiries without disclosure of the intelligence or United States Government affiliation of the person initiating the inquiry).

It is argued in support of such limitations that this type of collection should be specifically and strictly limited since the United States persons involved may not only have violated no law, but may not even be in possession of information of foreign intelligence or counterintelligence value, and yet they are subjected to scrutiny by the government because of mere circumstance or acquaintance. On the other hand, such limitations on techniques are opposed as impractical and unnecessary since there will be sufficient limitations on the type of information to be collected, and the use of the most intrusive techniques will be effectively prohibited for this purpose. Accordingly, the practical difficulties raised by arbitrarily limiting the remaining means of collection, and the definitional problems (e.g., what is "publicly available," what are "interviews") outweigh the benefit to be gained.

The alternatives in this case appear to include (i) imposing no additional, specific limitations on use of particular techniques to collect information concerning United States persons who are potential sources or contacts without their consent either by not identifying particular techniques available for this purpose, or by specifically excluding electronic surveillance or monitoring, physical search and mail opening, and mail surveillance, (ii) limiting collection for this purpose to public information, "national agency checks," and "interviews" as in S.2525, (iii) limiting collection for this purpose by specific reference to all or

some of the additional techniques available, such as acquiring "public" and nonpublic" information, pretextual and third-party interviews, physical surveillance, incidental collection, inquiries to existing or newly-developed sources, and national agency checks, or (iv) including no limitations on techniques in statute, leaving it to procedures approved by the Attorney General and restrictions on intrusive techniques to regulate these collection activities.

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